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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1702

EDWARD J. BARRY, THOMAS D. BATASTINI, NATALE R. CALE, JOHN CATALANO, MARTIN D. ESHOO, EDWARD F. FINN, CARL FLAGG, JOHN M. GERAGHTY, PHILIP R. GRANA, EDWARD McGEE, HARRY R. SALVESEN, JOSEPH A. SCHILLINGER, STEVE L. SENO, WILLIAM D. SWALLOW, THOMAS D. WEST, MIKE ZAKOIAN, and CLARENCE BRAASCH,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners[1/] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 11, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 528 F.2d 1094 (7th Cir. 1976) and is reproduced infra at A17-A27.

Three unreported opinions were filed by the district court, and are reproduced as follows:

1. A1-A3, opinion on order regulating discovery, filed April 23, 1975;

2. A4-A11, opinion on order deferring ruling on government's motion for summary judgment, filed June 10, 1975;

1/ Petitioners are Edward J. Barry, Thomas D. Batastini, Natale R. Cale, John Catalano, Martin D. Eshoo, Edward F. Finn, Carl Flagg, John M. Geraghty, Philip R. Grana, Edward McGee, Harry R. Salvesen, Joseph A. Schillinger, Steve L. Seno, William D. Swallow, Thomas D. West, Mike Zakoian, and Clarence E. Braasch.

3. A12-A16, opinion on order granting motion for summary judgment, filed July 11, 1975.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1): The judgment of the Court of Appeals was entered on January 11, 1976; re-hearing was denied without opinion on February 24, 1976.

QUESTIONS PRESENTED

1. Does the possibility that a "high government official would have to be extensively interrogated" justify a departure from Machibroda v. United States, 368 U.S. 487 (1962), and allow a district court to resolve issues of fact on a motion under 28 U.S.C. §2255 upon ex parte affidavits without a hearing?

2. May the "expanded record" procedure, as authorized in Rule 7 of the Rules Governing Section 2255 Proceedings, be applied to require a §2255 movant, as a prerequisite to a hearing, to prove false an affidavit filed by the government,

where the relevant facts are protected from disclsoure without judicial process by 28 C.F.R. §16.22, and where discovery of these facts is not permitted?

3. Is recusal of a district court judge required to comply with 28 U.S.C. §455 (1970) and the right of an accused to trial before a fair and impartial judge, when, as United States Attorney, the judge had formulated or approved the lawfulness of a then novel extension of federal criminal jurisdiction, and as judge is assigned to preside at one of the first cases seeking to apply his theories?

4. May the prosecutorial misconduct in misrepresenting to a district judge facts controlling his recusal decision in a criminal case be "harmless error?"

STATUTES AND REGULATIONS

The following statutes and regulations are reproduced in the appendix:

28 U.S.C. §455 (1970)

28 U.S.C. §2255

28 C.F.R. §16.22

Rule 7, Rules Governing Section 2255 Proceedings

STATEMENT OF THE CASE

On the ground that the Honorable William J. Bauer,[2] the district court judge who presided at their trial, had actively participated as United States Attorney in the preparation of their prosecution,[3] petitioners sought post-conviction relief under 28 U.S.C. §2255. The principal issues presented in this Court arise from the procedures used to dispose of the case without a hearing. To place these issues in context, a brief recital of the facts relevant to the underlying criminal case is required.

2/ Judge Bauer was United States Attorney for the Northern District of Illinois from July 1970 to November of 1971, and now sits as a circuit judge of the United States Court of Appeals for the Seventh Circuit.

3/ Petitioners alleged that the investigation resulting in their indictment had been on-going while Judge Bauer was United States Attorney (Petition, ¶14-18), that Judge Bauer had actively participated in the major policy decisions resulting in that indictment (Petition, ¶19, ¶20), and that United States Attorney Bauer had advised the grand jury which subsequently returned the indictment against petitioners (Petition, ¶23-¶25).

The Criminal Case

Petitioners were indicted on December 29, 1972,[4] and charged with having used their office as Chicago police officers to conspire to extort money from tavern owners, thereby affecting interstate commerce, all in violation of the Hobbs Act, 18 U.S.C. §1951. As the court below noted (A18), the indictment was based on a "then novel interpretation of the Hobbs Act."

(From the record in this case, it appears that the attorney for the government responsible for this "novel interpretation" is the same William J. Bauer who, as judge, presided at petitioners' trial.)

After petitioners had been indicted, their case was initially assigned to Judge Hoffman of the district court. Under the normal procedure of the Northern District of Illinois, assignment to Judge Hoffman meant that he would preside at trial.

4/ The grand jury had been impaneled in February of 1971. (A9)

After several months of pre-trial proceedings, the United States Attorney made an ex parte presentation to the Executive Committee[5/] of the district court, and obtained a transfer of the case away from Judge Hoffman to Judge Bauer, who had left his post as a United States Attorney to become a district court judge on November 29, 1971.[6/]

5/ The Executive Committee of the district court consists of the Chief Judge, as permanent chairman, and four other district court judges; the function of the Executive Committe is to "administer and conduct" the business of the district court. See General Rules 1, 1A, United States District Court for the Northern District of Illinois.

6/ The authorization for this transfer was an unpublished general order of March 10, 1972, which allowed the Executive Committee to specially assign, or reassign, cases identified to be "protracted, difficult, or widely publicized." The rule did not create a procedure for designating such cases; as the Executive Committee subsequently noted in United States v. Keane, 375 F.Supp. 1201, 1205 (N.D. Ill. 1974), it is permissible for the United States Attorney to make an ex parte presentation and obtain a reassignment.

Defendants all objected to transfer of the case to Judge Bauer; these objections were denied, and the transfer of the case was upheld on appeal.[7/]

In another ex parte presentation, Judge Bauer was advised by the government that the investigation resulting in the indictment had commenced after he left the United States Attorney's office. (A18) Judge Bauer then elected not to disqualify himself, and presided at the lengthy trial, upholding the propriety of the "novel interpretation" of the Hobbs Act underlying the prosecution.

The government's case was far from overhwelming: four of the twenty-three co-defendants were acquitted. On appeal, the evidence was viewed in the light most favorable to the government, and held sufficient. (Viewed in this light, even the evidence resulting in acquittals would have been sufficient to sustain guilty verdicts.) Other grounds for reversal were rejected, and the convictions were affirmed, sub nom. United States v. Braasch, 505 F.2d 139 (7th Cir.

7/ United States v. Braasch, 505 F.2d 139, 147 (7th Cir. 1974).

Collateral Proceedings

During the pendency of direct appellate review, petitioners commenced this proceeding under 28 U.S.C. §2255.[8/] After formal notice of the filing of the §2255 motion had been ordered, the government filed a "motion to dismiss," attacking the legal sufficiency of the §2255 motion, and expanding the record with an affidavit of an FBI agent in an attempt to demonstrate the absence of disputed questions of fact. Petitioners cross-moved for authorization of discovery; ruling on both motions was deferred pending final disposition of the criminal cases.

Following denial of certiorari in the criminal case, the district court concluded that disposition of the case required an expansion of the record and granted petitioners leave to commence discovery. (A2) Specifically excluded from permissible discovery were any inquiries of Judge Bauer.

8/ With the filing of their §2255 motion, petitioners filed a suggestion with the Chief Judge of the Seventh Circuit that the §2255 motion be heard by a judge from outside of the Seventh Circuit. Ex Parte Braasch, No. 75-8005. This suggestion was denied without explanation.

Petitioners then propounded a set of interrogatories to the government. After consent of the Attorney General had been obtained in accordance with 28 C.F.R. §16.24, petitioners deposed Mr. Thomas Foran, Judge Bauer's predecessor as United States Attorney.[9/] No further discovery was to be permitted -- after the Foran deposition, and without responding to the interrogatories, the government filed a "renewed motion for summary judgment." The gist of the motion was the claim that the Foran deposition and the affidavit of the FBI agent proved that petitioners had not been the target of a federal investigation until sometime after Judge Bauer had left the United States Attorney's office.

No other evidentiary material was tendered by the government to expand the

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9/ Foran stated that the decision to prosecute petitioners marked a vast departure from the prosecutorial policies extant while he was United States Attorney. In Foran's view, there was no federal crime to investigate or prosecute if a police officer had extorted money from a tavern owner.

record. Absent, for example, were any facts dealing with the activities of the indicting grand jury while Judge Bauer was United States Attorney. Nor did the government supply the date when the case was actually "logged in" at the United States Attorney's office, a fact placed in issue by the §2255 motion.

Absent discovery, the only way that petitioners could seek to dispute the government's affidavit was with evidence that an FBI investigation had been in progress before the date claimed by the government. Such an affidavit was filed, but was discounted by the district court as "a sworn statement by a felon with an interest in the outcome of a case." (A10)

The district court accepted the affidavit of the FBI agent as incontrovertible, holding that it conclusively proved that the investigation had started in April of 1972. (A9) The district court did recognize petitioner's need for discovery (A10), but held that petitioners had not

presented enough evidence through ex parte affidavits to justify a further expansion of the record.[10/]

After the record had been expanded with an affidavit from Judge Bauer,[11/] petitioners filed additional affidavits to show, as best they could, that an investigation had been in progress while Judge Bauer was United States Attorney. (See A21) These

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10/ The need for discovery was set out in an affidavit of one of the petitioners that 28 C.F.R. §16.21 et seq. prevented petitioners from obtaining ex parte affidavits of unquestioned veracity. As summarized by the district court (A10):

> ". . .[petitioners' contend] that the facts necessary to support petitioners' position are uniquely within the control of the United States Attorney, who because of his opposition to petitioners' case may be presumed to be withholding them."

11/ Judge Bauer contributed no facts as to his involvement in the novel interpretation of the Hobbs Act, or as to the date when the investigation started. The only allegation squarely denied by Judge Bauer was that, as United States Attorney, he had obtained personal knowledge of facts in dispute at petitioners' trial. Following receipt of Judge Bauer's affidavit, petitioners' abandoned this last contention.

affidavits were described as not "inconsistent" with the government's affidavit (A14), and the government's motion for "summary judgment" was granted.

The Court of Appeals approved disposition of the case without a hearing, agreeing with the district court that petitioners' affidavits were inadequate to controvert the affidavit of the FBI agent (A20), and applying a circuit rule that a §2255 movant must be able to expand the record with affidavits of third parties to controvert affidavits filed by the government in order to obtain a hearing (A26):

> The assertion that the district court should have held a hearing is based upon the language of section 2255 and the construction given it in Machibroda v. United States, 368 U.S. 487 (1962). However, it is the rule of this Court that, in order for a hearing to be granted, the petition must be accompanied by a detailed and specific affidavit which shows that the petitioner has actual proof of the allegations going beyond mere unsupported assertions.

The Seventh Circuit justified its departure from prior decisions of this Court as follows (A27 n. 32):

> A hearing was ordered in Sanders v. United States, 373 U.S. 1, 19-20 (1963), on the basis of allegations alone. However, the hearing there required testimony only from the petitioner himself. Where a high governmental official would have to be extensively interrogated, different considerations are appropriate, and the requirement of factual support for the allegations, established in this Court's prior decisions, will be read strictly.

ARGUMENT

I. THE §2255 PROCEDURES: A DEPARTURE FROM PRIOR DECISIONS OF THIS COURT TO RENDER §2255 AN INEFFECTIVE REMEDY

This case arises from the use of ex parte affidavits to "expand the record" in a proceeding under 28 U.S.C. §2255. The result of this procedure was dismissal of petitioners' motion to vacate sentence because they were unable to prove false an affidavit filed by the government.

"Expansion of the record" is a procedure formally recognized in Rule 7 of the Rules Governing Section 2255 Proceedings. The manner in which this potentially useful procedure was applied in this case requires review by this Court, not merely to correct an erroneous result reached below, but to insure that the new Rules are not read to justify a departure from prior decisions of this Court and transform §2255 into an ineffective post-conviction remedy.

a. The unfairness of the "expansion of the record" procedure sanctioned by the court below

The date when the investigation resulting in petitioners' indictment had commenced was recognized to be a material question of fact in the case. (A5-A6) Subsequent to the filing of the §2255 motion, the government "moved to dismiss" on the basis of an affidavit of FBI Special Agent James Annes, who averred that he had started the investigation, and that it had started in May of 1972.

Under the Rules of Civil Procedure, the "motion to dismiss" would have been considered as a motion for summary judgment, and petitioners would have been allowed an opportunity to present "all material made pertinent to such a motion by Rule 56." See Federal Rule of Civil Procedure 12(c).[12/] But under the

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12/ ". . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment, and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

"expansion of the record" procedures sanctioned by the court below, this opportunity to demonstrate a disputed question of fact did not include a fair opportunity to undertake discovery. (A25-A26)

Under the Rules of Civil Procedure, the affidavit of petitioner Geraghty that discovery was necessary to pierce the web of confidentiality created by 28 C.F.R. §16.21 et seq., and obtain the best evidence to dispute the government's affidavit, would have prevented the grant of summary judgment to the government. See Federal Rule of Civil Procedure 56(f).[13/] Compare Schoenbaum v. Firstbrook, 405 F.2d 215, 218 (2d Cir. 1968) (en banc) But under the "expansion of the record" procedures sanctioned by the

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13/ "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

court below, the fact that 28 C.F.R. §16.22 prevented petitioners from effectively disputing the affidavit proffered by the government did not lessen their burden to demonstrate, without discovery, the existence of a disputed question of fact.

Under ordinary summary judgment rules, the failure of the government to have come forth with the date when the case against petitioners was "logged in" at the United States Attorney's office would have prevented a grant of summary judgment to the government. E.g., Adickes v. Kress, 398 U.S. 144 (1970); Askew v. Hargrave, 401 U.S. 476 (1971). But under the "expansion of the record" procedures sanctioned by the court below, the government need not disprove the facts placed in issue in the §2255 motion, and there is no presumption arising from the government's failure to produce evidence solely within its control. Compare 2 Wigmore, Evidence §285 (3d ed 1940).

Under the rule of United States v. Diebold, 369 U.S. 654 (1962), the affidavits would have been viewed in the light most

favorable to petitioners, as the party opposing the grant of summary judgment. Petitioners' affidavits indicated that, prior to the start of the "Annes investigation" in May of 1972, other FBI agents had been conducting an identical investigation, and had been seeking to link at least two of the petitioners in this case with the type of acts alleged in the subsequent indictment. (See A21-A22) The affidavit of Judge Bauer indicated that he considered his recusal, but elected not to disqualify himself on the basis of ex parte representations by the government. (A18)

At the very least, these affidavits supported an inference that the affidavit of Agent Annes was less than complete, if not untruthful. But under the "expansion of the record" procedures sanctioned by the court below, these affidavits were viewed in the light most favorable to the government, and rejected as lacking in credibility (A10), or as leaving "undisputed" (A21) the government's affidavit.

The "expansion of the record" procedures sanctioned by the court below are strictly one-sided, providing the government with an opportunity to rebut the

allegations of a motion under 28 U.S.C. §2255, without providing the §2255 movant with a meaningful opportunity to rebut affidavits filed by the government.

b. The "expansion of the record" procedures sanctioned by the court below are contrary to prior decisions of this Court

To allow affidavits, as in this case, to replace a hearing is to depart from the holdings of this Court in Walker v. Johnson, 312 U.S. 275 (1949), Machibroda v. United States, 368 U.S. 487 (1962), Sanders v. United States, 373 U.S. 1 (1963), and Fontaine v. United States, 411 U.S. 213 (1973).

Fontaine v. United States, supra, should have laid to rest any lingering doubts that §2255 required a hearing to determine facts outside the record of the criminal case. There, the government had argued that when a "motion under §2255 alleges only bald conclusions, the motion may be properly denied without a hearing." (Brief of United States at 32) This argument was summarily rejected, 411 U.S. at 215:

> It is equally clear that §2255 calls for a hearing on such allegations unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief' . . .

The Seventh Circuit recognized its departure from prior decisions of this Court (A26), but relied on a circuit rule that a §2255 movant must be able to expand the record, without discovery, to prove untruthful affidavits filed by the government, in order to obtain the hearing mandated by the statute.[14/] A "strict application" of this circuit rule was justified to insulate a "high government official" from "extensive interrogation." (A27 n. 33) Although the fears of the court below are mis-

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14/ The circuit rule is based on United States v. Spadafora, 200 F.2d 140 (7th Cir. 1952), where a §2255 motion which named government agents who would testify that they had perjured themselves at trial was held insufficient to require a hearing, because the prisoner had failed to obtain affidavits from the government agents admitting their perjury, 200 F.2d at 143. This rule evolved into its present form in United States v. Mathieson, 256 F.2d 803, 805 (7th Cir. 1958), a case relied upon in the opinion below (A26 n.32)

placed,[15/] this rationale would always make the government's affidavits conclusive against a §2255 movant whenever the affidavit came from a "high government official," such as, apparently, an FBI agent.

A conclusive presumption that "high government officials" tell the whole truth, and nothing but the truth, in ex parte affidavits is a remnant from a much earlier age.[16/] Such a presumption is scarcely in accord with the lessons of these post-Watergate years.

It is not even necessary to assume that the FBI agent whose affidavit resulted in dismissal of the case was being perjurious in order to recognize the unreliability of a fact-finding process dependent solely on affidavits carefully drafted by government counsel. The affidavit of agent Annes fails to

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15/ Petitioners expected the proof of their allegations to come from records and documents maintained by the government, the existence of which petitioners sought to discover in their unanswered interrogatories.

16/ At early common law, a controversy could be settled by oath, and the word of a bishop or a king, even if unsworn, was incontrovertible. See Attenborough, The Laws of the Earliest English Kings (1922) at 27.

establish that other agents were not involved in the investigation prior to his assignment to that investigation; as to his averment that his investigation was the basis for petitioners' indictment, agent Annes might simply be mistaken -- only a member of the United States Attorney's office could have firsthand knowledge as to what information was the basis of an indictment.

The affidavit of agent Annes sheds no light on the activities of other agents, and provides no basis for assuming that, prior to Annes, there was no investigation. Nor does the affidavit indicate when the case was first "logged in" at the United States Attorney's office.

No other circuit has fashioned a conclusive presumption of veracity for affidavits submitted by "high government officials." Aside from the Seventh Circiut, the general rule is that the government's affidavits are not conclusive against the movant. E.g., United States v. Salerno, 290 F.2d 105, 106 (2d Cir. 1961); Romero v. United States, 327 F.2d 711, 712 (5th Cir. 1964); Schiebulhut v. United States,

357 F.2d 743, 745 (6th Cir. 1966); Del Piano v. United States, 362 F.2d 931, 932 (3d Cir. 1966).

c. Review is necessary to insure that the "expansion of the record" procedure does not transform 28 U.S.C. §2255 into an ineffective post-conviction remedy

The newly promulgated Rules Governing Section 2255 Proceedings authorize expansion of the record (Rule 7) and disposition on the expanded record without an evidentiary hearing. (Rule 8) But if these rules are applied in the manner sanctioned by the Seventh Circuit, §2255 will have been transformed into an ineffective post-conviction remedy.

Rule 7 allows affidavits to be considered as part of the expanded record. As originally proposed by the Advisory Committee, affidavits would only have been considered as a part of the expanded record if they were not controverted. This qualification is omitted in the final version of the rules, and this omission extends an invitation to the lower federal courts, as here, to make credibility determinations from opposing affidavits.

"Trial by affidavit" is alien to the

accepted and ordinary manner of resolving factual disputes. E.g. United States v. Diebold, 369 U.S. 654 (1962); Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962). Cf. Moore v. Illinois, 423 U.S. 938 (1975) (Stewart, J., concurring in denial of certiorari)

With reasonable discovery, though, the expanded record procedure of Rule 8 of the Rules Governing Section 2255 Proceedings could be consistent with the ultimate holding of Machibroda v. United States, supra, that a district judge may use his "common sense" in determining if a hearing is required, 368 U.S. at 495. If, for example, a district judge is confronted with affidavits from five government witnesses squarely disputing the prisoner's assertions, examination of documents and depositions of the witnesses may indicate that a hearing would be fruitless, and, in the judge's "common sense" could be dispensed with.

In this case, however, petitioners were not afforded an opportunity to examine the relevant documents in the exclusive possession of the government, or to depose the FBI agent whose affidavit was supplied by the government. No claim of privilege was asserted; nor did the government con-

tend at any time that responses to the interrogatories would be unduly burdensome.

The question of when the investigation commenced was determined solely on the basis of the affidavit of one FBI agent; petitioners were not permitted to inquire into the activities of other FBI agents, or even to determine when the case was "logged in" at the United States Attorney's office.

Fair application of the expanded record procedures may well have demonstrated to petitioners that they would be unable to prove their allegations. Under such circumstances, petitioners, who were represented by counsel, could reasonably be expected to have abandoned the action. Cf. Federal Rule of Civil Procedure 11; 28 U.S.C. §1927; Code of Professional Responsibility, Disciplinary Rule 2-110; Anders v. California, 386 U.S. 738 (1967).

The expansion of the record in this case, however, did not conclusively demonstrate that petitioners' allegations could not be proven: petitioners were simply not provided with a fair opportunity to demonstrate that with full disclosure of the relevant facts they would

not have been able to prevail at a hearing.

If allowed to stand, the decision below would transform the expansion of the record procedure into a mechanism for disposing of §2255 motions on the basis of ex parte affidavits submitted by the government, without the §2255 movant being afforded a fair opportunity to dispute those affidavits. Such a result would do violence to this useful procedural device, and render ineffective the remedy provided by 28 U.S.C. §2255. See A.B.A. Standards Relating to the Administration of Criminal Justice, Post-Conviction Remedies, §3.4.

Certiorari should therefore be granted to review the unreasonable departure by the court below from prior decisions of this Court, and to insure that the newly promulgated Rules Governing Section 2255 Proceedings will not be applied to render ineffective the remedy provided by §2255.

II. ACTIVE PARTICIPATION BY AN ATTORNEY FOR THE GOVERNMENT WHO IS ELEVATED TO THE BENCH: IMPORTANT AND UNRESOLVED QUESTIONS

Notwithstanding the unfair "expansion of the record" procedures sanctioned by the court below, petitioners were able to demonstrate that, as an attorney for the government, Judge Bauer had actively participated in the preparation of the case brought against petitioners. Departing from the view of the Sixth Circiut,[17/] the court below held that no degree of active participation could have required recusal, as long as the case against petitioners had not resulted in the return of an indictment while Judge Bauer served as an attorney for the government. Review by this Court is required, not merely because of the conflict between the circuits, but to resolve the questions identified by Mr. Justice Rehnquist in his memorandum in Laird v. Tatum, 409 U.S. 824 (1972), questions which are still extant notwithstanding the enactment of a new disqualification statute, Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609.

17/ United States v. Wilson, 426 F.2d 628 (6th Cir. 1970)

a. The degree of active participation

Petitioners were prosecuted on what the court below recognized was a "then novel interpretation of the Hobbs Act," (A18), 18 U.S.C. §1951. This interpretation was "novel" for two reasons: First, it read the Act as reaching conduct to which it had not formerly been applied.[18/] Second, it represented a major policy decision to apply the federal prosecutorial power to what had formerly been considered to be only violations of local law.[19/]

The attorney for the government responsible for this "novel interpretation," and for the major policy decision underlying that "novel interpretation" is the Honorable William J. Bauer, who, as judge, presided at petitioner's trial,

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18/ The Hobbs Act is the successor to the Anti-Racketeering Act of June 18, 1934, 48 Stat. 979, enacted "to close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." See United States v. Local 807, I.B.T., 315 U.S. 521, 530 (1942).

19/ The deposition of Thomas Foran, Judge Bauer's predecessor as United States Attorney, revealed that prior to the time Judge Bauer became United States Attorney, the prosecutorial philosophy of that office was that there was no federal crime to prosecute if a municipal police officer was "shaking down" local taverns.

where his novel interpretation of an old statute was being tested and applied.[20/] As the architect of the case before him, it is difficult to accept that Judge Bauer did not have "the interest that any lawyer has in pushing his case to a successful conclusion.[21/]

b. The need for more explicit standards

That due process of law requires a judge in a criminal trial to be "fair and impartial" is well settled. This Court has held a judge to be of less than the required impartiality when he had a monetary interest in the outcome of a case,[22/] where he had served as a "one man grand jury,"[23/] and where the judge had been intimately involved with the proceedings giving rise to the case be-

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20/ Using testimony from another trial, petitioners were able to indisputably demonstrate that the "Hobbs Act" policy decision was made while Judge Bauer was United States Attorney.

21/ Adams v. United States, 302 F.2d 307, 310 (5th Cir. 1962)

22/ Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Village of Monroeville, 409 U.S. 57 (1972)

23/ In re Murchison, 349 U.S. 133 (1955)

fore him.[24/]

The "underlying premise" was set out in Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968):

> . . . any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.

The question of what degree of prior involvement in the planning of a case as an attorney for the government requires disqualification has never been resolved by this Court. In his memorandum in Laird v. Tatum, 409 U.S. 824 (1972), Mr. Justice Rehnquist read the recusal standard as requiring disqualification whenever the judge, as an attorney for the government, had actively participated in the preparation of a case. 409 U.S. at 828. Application of this standard would appear to have required Judge Bauer's disqualification, but the court below read the opinion of Mr. Justice Rehnquist as supporting its result (A26). This is somewhat inexplicable, as Mr. Justice Rehnquist stated

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24/ Johnson v. Mississippi, 403 U.S. 212 (1971); Bloom v. Illinois, 391 U.S. 194 (1968)

unequivocally that he had had no involvement with the planning of the government's defense in Laird, having served merely as a conduit for the views of the administration in an appearance before a congressional committee. 409 U.S. 826-828. In contrast, in this case, Judge Bauer had apparently been actively involved in the major policy decisions underlying the decision to prosecute petitioners, policy decisions which were untested at the time of trial.[25/]

This Court has yet to squarely confront the question of what degree, if any, of prior involvement in the preparation of a case requires disqualification when that case comes before the former govern-

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25/ In United States v. DeMet, 486 F.2d 816 (7th Cir. 1973), the Court of Appeals accepted for the first time the theory that 18 U.S.C. §1951 applied to extortionate acts having a de minimus effect on interstate commerce. In United States v. Staszchuk, 502 F.2d 875 (7th Cir. 1974), rev'd in part on rehearing, 517 F.2d 53 (7th Cir. 1975), the Court of Appeals held for the first time that the type of extortion made punishable by 18 U.S.C. §1951 included extortion "under color of official right," i.e., absent any force or threat of force. The decisions in both of these cases came subsequent to petitioners' trial.

ment attorney as judge.[26/] Members of this Court have reached varying and often unexplained answers to this question. While allowing recusal to be the decision of each justice individually may be appropriate for this Court, one consequence is the absence of clear standards for the lower federal courts. Government service is a very common form of employment for attorneys who become federal judges, and the questions presented in this case are likely to recur. To provide more discernible standards for federal judges, therefore, certiorari should be granted to review the decision of the court below that the active participation did not require disqualification.

26/ The disqualification question presented in this case has not been resolved by the 1974 amendment to 28 U.S.C. §455, Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609. Section (a)3 of the new act requires disqualification whenever the judge, as an attorney for the government, had "participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." "Proceeding" is defined in section (d)1 to include "pretrial, trial, appellate review, or other stages of litigation."

Under the view of the court below, it appears that the new statute would not require disqualification if the "proceeding" had not reached a stage of litigation attempting "to bring named alleged offender[s] before the court." (A22)

III. THE DECISION BELOW SANCTIONS UNCONSCIONABLE JUDGE SHOPPING PRACTICES

After Judge Bauer's affidavit had been filed in the district court, it was apparent for the first time that, upon being assigned the criminal case, he had seriously considered disqualification, and that on the basis of the ex parte presentation of the Annes affidavit, he had elected not to disqualify himself.

A reasonable inference arising from petitioners' affidavits -- which indicated the existence of an investigation while Judge Bauer was United States Attorney -- is that the government made less than a complete presentation to Judge Bauer in order to prevent his recusal, and that the intent of the government was to obtain a judge with a known favorable predisposition.

Petitioners argued this inference to the district court, asserting that the government's misrepresentation was prosecutorial misconduct requiring relief under 28 U.S.C. §2255.[27/] This claim was

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27/ See Petitioners' Memorandum, filed July 7, 1975, at 1-2, 14-15.

reasserted on appeal. (See A19)

Inexplicably, the Court of Appeals held that this claim had not been raised in the district court. (A25) Alternatively, the court below held that the misrepresentation was "harmless error." (Ibid)

This "harmless error" determination was made without recourse to the trial court record; if allowed to stand the decision of the court below sanctions unconscionable judge shopping practices.

The criminal case had initially been assigned to Judge Hoffman of the district court. Apparently, the government was dissatisfied with Judge Hoffman, and convinced the Executive Committee of the district court to re-assign the case to Judge Bauer. This itself is deplorable -- our system does not allow either defense or the prosecution to choose the judge before whom a case will be tried.

As the architect of the theory underlying the prosecution, Judge Bauer -- even if he could appear fair -- had a known favorable predisposition to the prosecution. Obviously, the prosecution wanted to keep the case with Judge Bauer, and apparently misrepresented to him facts bearing on his recusal decision.

In United States v. Parker, 447 F.2d

826 (7th Cir. 1971), Justice (then judge) Stevens indicated that when the prosecution manipulates assignment procedures to have a case assigned to a judge with a known favorable predisposition, at the least a stricter standard of review of the sufficiency of the evidence and the prejudicial effect of alleged error is required. The manipulation of the assignment procedures in this case is far more egregious than in Parker -- rather than relying on a district court rule, the prosecution here misrepresented facts to insure that Judge Bauer would not recuse himself. To hold this conduct "harmless error" is to encourage the government to deceive district court judges, a vast departure from the accepted and ordinary standards of disclosure, requiring review by this Court.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth N. Flaxman
5549 North Clark Street
Chicago, Illinois 60640

Attorney for Petitioners

May 1976

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD J. BARRY, et al.,

Petitioners,

-vs- No. 74 C 3432

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

On November 26, 1974, petitioners moved this Court to vacate judgments entered concerning them in case No. 72 Cr 979, and to grant a new trial. This motion was filed under the provisions of 28 U.S.C. §2255. Petitioners also sought leave to take discovery in support of their petition. The government responded thereto with a motion to dismiss.

On March 13, 1975, after hearing, this Court denied the motion of the plaintiffs for discovery and the motion of the government to dismiss, without prejudice to their renewal and

reconsideration after the determination by the United States Supreme Court of a petition for certiorari then pending.

The petition for certiorari then pending has been denied, and this Court has assumed jurisdiction over the §2255 motion for a new trial.

Leave is hereby given to petitioners to commence discovery for the purpose of inquiring into the facts and circumstances surrounding their allegations in support of their motion for a new trial.

The question has been raised whether leave should be given petitioners to depose or otherwise take discovery of the Honorable William J. Bauer, of the United States Court of Appeals for the Seventh Circuit, who was the trial judge in this case. The affidavits on file raise factual issues concerning which Judge Bauer might have information. Permission to take discovery of Judge Bauer, however, and the determination of the form that discovery should take, is deferred until the balance of the petitioners' discovery is complete and the question of whether Judge Bauer can make a factual contribution to the

resolution of the issues may be determined.

ENTER:

/s/ Frank J. McGarr
United States District Judge

DATED: April 23, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD J. BARRY, THOMAS D. BATASTINI, NATALE R. CALE, JOHN CATALANO, MARTIN D. ESHOO, EDWARD F. FINN, CARL FLAGG, JOHN M. GERAGHTY, PHILIP R. GRANA, EDWARD McGEE, HARRY R. SALVESEN, JOSEPH A. SCHILLINGER, STEVE L. SENO, WILLIAM D. SWALLOW, THOMAS D. WEST, MIKE ZAKOIAN and CLARENCE E. BRAASCH,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

No. 74 C 3432

MEMORANDUM OPINION AND ORDER

Petitioners have moved to vacate judgments of conviction entered as to them in case No. 72 CR 979 and seek a new trial. The basis of their claim is the allegation that the trial judge in that case, The Honorable William J. Bauer, had an obligation to disqualify himself for the reason that:

a. ". . . the trial was the result of a substantial investigation which had been commenced or continued within the Northern District of Illinois while the judge served as the United States Attorney for that district, had knowledge of the investigation, and

had participated in the investigation in various manners, including but not limited to taking part in the consideration of the major policy decisions relevant to that investigation and the resulting criminal proceedings.

b. The trial followed an indictment for which evidence was formally presented to a grand jury within the Northern District of Illinois during the tenure of the trial judge as United States Attorney for the Northern District of Illinois."

These sweeping allegations seem to rest principally if not almost entirely on petitioners' contention that the investigation which resulted in petitioners' indictment commenced during the term of office of Thomas A. Foran as United States Attorney for the Northern District of Illinois. This, it is contended, mandates the conclusion that the investigation was pending during the term of Mr. Foran's successor as United States Attorney, William J. Bauer. Therefore, it is argued, Judge Bauer participated in policy decisions on this investigation and was thus disqualified under 28 U.S.C. §455 from presiding at petitioners' trial.

The original motion to vacate sentence alleged the pendency of the investigation during Judge Bauer's term as United States Attorney, his knowledge of the investigation and participation in it, and its presentation at least in part to the Grand Jury during his term of office, all on information and belief. The one factual allegation from which all these inferences apparently followed was the conclusion from an affidavit of Thomas Foran that if the investigation was going forward during Mr. Foran's term of office, it must have necessarily continued through or at least into the term of office of his successor as United States Attorney, William Bauer.

The affidavit of Thomas A. Foran stated in essence that it was affiant's opinion that during his term of office as U.S. Attorney, he had acquired information concerning the case against one or more of the defendants in the instant case such that he had a conflict of interest preventing him from later undertaking their defense. Mr. Foran felt unable to give further details without judicial authorization.

Petitioners moved for leave, under 28 U.S.C. §2255, to take discovery and, in particular, to depose Thomas Foran. The court approved this deposition which has been concluded and filed with the court.

Based upon this deposition, the government has moved for summary judgment.

The deposition of Mr. Foran reveals that he obtained what is referred to as an "intelligence report" during 1970 from a senior officer of the FBI concerning, among many other things, payoffs to police from a Club in the 18th district to protect activities involving prostitution. The report was presented to Mr. Foran in connection with the then-pending appointment of a police official to a higher post. It also incidentally named Commander Braasch as being involved. The report as described was clearly very preliminary. The information is characterized as allegations and described by the witness as ". . . almost in the rumor stage". The report was presented to U.S. Attorney Foran for informational purposes, and was not the presentation of an investigative report for prosecutive decision. As an intelligence report, it was a gathering of information from informants which served to focus subsequent investigative activity. After reading and discussing the report, Mr. Foran returned it to the FBI.

Mr. Foran testified that he did not take it as an investigation of the violation of Federal laws, nor did he feel that the FBI agent presenting it was thinking in those terms. The witness was certain that there was no discussion with investigative agencies concerning the possible application of the Hobbs Act to police activities. There was no discussion of continuing the investigation or of possible prosecution.

Mr. Foran testified that when he was later contacted to discuss possible representation of Clarence Braasch in the instant case, he had previously seen news stories about the Cousins Club and these stories, plus the discussion with Braasch, made him recall the mention of Braasch and his possible involvement with the payoffs from the Cousins Club in the intelligence report above referred to. This recollection caused Mr. Foran to conclude that he should not represent Braasch.

The witness testified that to begin a case in the United States Attorney's office, a procedure known as "logging in" was used. No case was logged in arising out of the allegations in the report in question and no investigation was commenced. U.S. Attorney Foran regarded the report as speculative and general, and without sufficient information to conclude that there had been a violation of Federal law.

Prior to Mr. Foran's leaving the U.S. Attorney's office, he did not discuss this case with James Thompson, who was to serve as William Bauer's first assistant and who joined the staff before Bauer to become acquainted with the office and its operations. Neither did Mr. Foran ever discuss the matter with his successor, U.S. Attorney Bauer.

When Clarence Braasch inquired of Mr. Foran concerning representation, Foran inquired of the former

Chief and Assistant Chief of the Criminal Division and the former head of the Organized Crime, Special Prosecution Unit who had served under him. None had any recollection of the report in question or any pending case involving Braasch.

This deposition mandates the conclusion that no case involving the petitioners was opened in the United States Attorney's office during the term of office of Thomas Foran. A fortiori, no such case or investigation was pending in the office when United States Attorney Bauer assumed his duties on July 13, 1970.

With a single exception, later to be discussed, the record before me reveals that the next subsequent activity in connection with the petitioners begins on May 4, 1972 when, as the affidavit of James J. Annes, Special Agent of the FBI relates, the investigation by the FBI which resulted in the indictment involved here was commenced. At this time, Judge Bauer was sitting on the United States District Court, having been sworn in on November 29, 1971.

The single evidentiary challenge to the contention that the investigation leading to the instant indictment commenced in 1972, after Judge Bauer had left the office of the United States Attorney, is the affidavit of one Steve L. Seno offered by petitioners. Steve Seno is one of the convicted defendants in this case, and one of the petitioners moving the court to set aside the judgment and vacate his sentence.

In Mr. Seno's affidavit, dated June 5, 1975, he relates that he was a police officer assigned to the Vice Unit of the 18th District in the summer of 1970. He states that at that time he was told by a tavern owner, whose identity is not related, that Federal agents whose identity is not

related, had questioned the tavern owner about payoffs to Chicago police officers and had shown the tavern owner pictures, among which were those of affiant Seno and his co-defendant Edward Finn.

It is the finding of this court that the evidence before it establishes that no investigation involving petitioners, or resulting in their indictment, was commenced in the office of the United States Attorney during the term of United States Attorney Thomas Foran. The court further finds that the peripheral mention of petitioner Braasch and the Cousins Club in a memorandum read by U.S. Attorney Foran in connection with a matter unrelated to the instant case, was not mentioned by Mr. Foran to his successor in office, William Bauer.

The court finds that the investigation in the 18th District resulting in the instant indictment was commenced after William Bauer left the office of United States Attorney.

There remains for consideration only the narrow issue of whether, despite the opening of the FBI investigation at a later date, there was some activity relevant to the case in the office of the United States Attorney while Judge Bauer held that post.

Petitioners clearly and forcefully so allege. In their memorandum in opposition to the renewed motion for summary judgment, petitioners summarize their position in terms of the three claims they make, as follows:

1. Petitioners were indicted by the special February 1971 grand jury, and evidence upon which this indictment was based was first presented to the grand jury during the tenure of Judge Bauer as United States Attorney (Petitioner, ¶25)

2. The decision to present such evidence to the grand jury was the result of significant policy decisions in

which Judge Bauer, while United States Attorney, had participated. (Petition, ¶20)

3. While United States Attorney, Judge Bauer acquired personal knowledge of disputed facts which were later to be at issue at petitioners' trial. (Petition, ¶10-18)

The totality of the pleadings on this petition virtually compel the conclusion that all of petitioners' allegations at the outset rested upon the fragile foundation of the Foran affidavit. If this is so, and there is no reason to suppose petitioners would not have disclosed more if they had more, the logic by which the factual contentions of this limited affidavit support the broad sweep of petitioners' claims is incomprehensible. That affidavit, having been elucidated by Mr. Foran's deposition, no longer supports the claim that an investigation involving any of the petitioners, or any aspect of this case, was underway during Mr. Foran's term of office. Thus, the serious charges filed by petitioners, summarized in their words above, stand supported by two props.

The first is the Seno affidavit. This is a sworn statement by a felon with an interest in the outcome of a case, reciting hearsay information from an unidentified source.

The second is the contention that the facts necessary to support petitioners' position are uniquely within the control of the United States Attorney, who because of his opposition to petitioners' cause may be presumed to be withholding them. As to this contention, it should be noted that even though petitioners' allegations are based upon information and belief, this phrase cannot be a cloak for irresponsible accusations or groundless imaginings. The phrase means what it says: that is the possession by the pleader of some modicum of information sufficient to support a belief. It is difficult to imagine the Foran affidavit supporting the beliefs the pleader apparently drew from it.

It would be quite possible on the basis of the record before me to dismiss the petitioners', motion to vacate sentence for the reason that the proof of the allegations of petitioners is so negligible as to consist virtually of unsupported assertions. *Davis* v. *United States*, 311 F.2d 495, 496 (7th Cir. 1963); *Moody* v. *United States*, 497 F.2d 359, 362 (7th Cir. 1974); *United States* v. *Trumblay*, 256 F.2d 615 (7th Cir. 1958); *United States ex rel. Swaggerty* v. *Knoch*, 245 F.2d 229 (7th Cir. 1957).

But because these virtually unsupported assertions reflect unfavorably upon a judge of the Court of Appeals, it would be a disservice to him not to allow the record to reflect his response to the accusation that he failed to recuse himself in an instance where he was obligated to do so.

The cause is continued therefore, for the purpose of allowing Judge Bauer to respond by affidavit to the contentions of petitioners as quoted above on page eight of this memorandum.

Upon receipt of Judge Bauer's response to this invitation, this court will, with a supplemental opinion, make final disposition of the government's motion for dismissal or summary judgment.

If Judge Bauer files an affidavit with this court, petitioners may take five days to comment upon it, if they wish.

Enter:

/s/ *Frank J. McGarr*
United States District Judge

Dated: June 10, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD J. BARRY, THOMAS D. BATASTINI, NATALE R. CALE, JOHN CATALANO, MARTIN D. ESHOO, EDWARD F. FINN, CARL FLAGG, JOHN M. GERAGHTY, PHILIP GRANA, EDWARD McGEE, HARRY R. SALVESEN, JOSEPH A. SCHILLINGER, STEVE L, SENO, WILLIAM D. SWALLOW, THOMAS D. WEST, MIKE ZAKOIAN and CLARENCE E. BRAASCH,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

No. 74 C 3432

MEMORANDUM OPINION AND ORDER

Petitioners have moved to vacate judgments of conviction entered as to them in Cause No. 72 CR 979, and seek a new trial. Their contentions were considered and substantially disposed of in an earlier memorandum opinion (June 10, 1975). That opinion left final resolution of pending government motions to dismiss or for summary judgment open to allow Judge William Bauer (whose failure to disqualify himself is the source of petitioners' complaint) to file an affidavit to complete the record in the matter. Petitioners were given time to comment on this affidavit.

Petitioners having once briefed the issues raised by their pleadings, were expected to limit their recently-filed memorandum to matters contained in Judge Bauer's affidavit. Instead they have filed, on July 7, 1975, a second lengthy memorandum rearguing old issues and raising new ones.

The pleading should be, and in other circumstances would be, stricken. However, the issues involved are too significant to be resolved by rulings based on the procedural improprieties of counsel. The Court therefore has accepted and considered petitioners' second memorandum.

Petitioners have contended in their earlier pleading that their trial was the result of a ". . . substantial investigation . . ." conducted while Judge Bauer was U.S. Attorney with his knowledge and participation and that the matter was presented to the Grand Jury while Judge Bauer was U.S. Attorney.

In a memorandum dated June 10, these allegations were found to be groundless by this Court. Petitioners in their second memorandum raise the question again, this time with two court reporter transcriptions of interviews, one with a Raphael Deady, the other with Police Sergeant John Rouzan. Both address themselves to the government's contention that the Federal investigation leading to indictment No. 72 CR 979 commenced in May of 1972. The interview with Raphael Deady reveals that he recalls being questioned about payoffs to policemen by persons identifying themselves as FBI agents and that this occurred in late 1971. The interview with Sergeant John Rouzan reveals his knowledge of an FBI contact of his father and questions concerning payoffs to policemen. Sergeant Rouzan overheard this conversation while he was painting the ceiling. The witness had great difficulty

fixing the time and has unsuccessfully searched for records to assist him. He states that this was either late summer of 1971 or late summer of 1972, and during the course of the interview, concludes that it had to be 1971 because in 1972, he would have been too busy to paint.

The evidentiary impact of these two interviews is negligible. It adds little to the minimal content of the Seno affidavit discussed in this Court's earlier opinion.

Whatever slight evidentiary value is found in the totality of petitioner's affidavits tends to establish the proposition that at a date prior to May, 1972, FBI agents may have questioned tavern owners in the 18th District on extortion by policemen.

It is not necessary to conclude that the events described in the petitioners' affidavits are inconsistent with the affidavit of FBI Agent James J. Annes to the effect that the Hobbs Act investigation resulting in this indictment was officially opened in May of 1972. It was the thrust of this affidavit that the earliest possible time when the United States Attorney would have become aware of the existence of the investigation was that May, 1972 date, which of course was after Judge Bauer had left that office. Evidence suggesting that FBI agents may have made inquiries in the 18th District, even if it were convincing, is not relevant to nor illuminative of the date on which Judge Bauer might have learned of the case by virtue of its first presentation to the office of the United States Attorney by the FBI.

Petitioners, having failed to adduce any support for what has been revealed to be the groundless and irresponsible allegations of their first pleading, now fall back to a second and newly asserted position, briefed at length in

their July 7 memorandum. The gist of this contention is that Judge Bauer, while United States Attorney, participated in the decision to invoke, for the first time, the Hobbs Act against Chicago police officers. This conclusion is drawn only inferentially from the evidence argued by petitioners, but this point need not be labored. Twenty-eight U.S.C. §455 refers to ". . . any case . . ." in which a judge has had a substantial interest. A general policy decision to interpret or apply a statute in a given way, is not a case nor a decision made within the context of a case. *In re Testa*, 486 F.2d 1013 (3d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974). No view of petitioners' evidence, however indulgently favorable, supports the proposition that then U.S. Attorney Bauer had any obligation under 28 U.S.C. §455 to disqualify himself.

In this Court's memorandum opinion of June 10, 1975, a finding was made that the investigation of the 18th Police District resulting in the instant indictment was commenced and first presented to the office of the United States Attorney after Judge Bauer had left that office. There was left open for further consideration the possibility that, despite this fact, the investigation might have come to Judge Bauer's attention prior to the logging in of the case, at some time during his term as United States Attorney. The Court recognized this possibility, not because petitioner had produced any evidence in support of it, but only because the Annes affidavit, while inferentially denying this assertion, did not expressly do so.

Judge Bauer's affidavit is now of record denying any discussions, decisions or knowledge of facts related to this case. Petitioners' contention that Judge Bauer's disclaimer of factual knowledge is too narrow and avoids the question of policy decisions on Hobbs Act prosecutions, has been discussed earlier and is without merit.

The relief sought by petitioners is not available on the basis of unsupported allegations. Petitioners stand before the Court after some discovery, a great deal of time, several affidavits and two memoranda, having failed to give substance to their original serious, unfounded charges. The tactic stands revealed as a series of unsupportable factual allegations irresponsibly filed to achieve a postponement of imprisonment. No further discovery or hearing is warranted on these contentions. *Davis* v. *United States*, 311 F.2d 495, 496 (7th Cir. 1963); *Moody* v. *United States*, 497 F.2d 359, 362 (7th Cir. 1974); *United States* v. *Trumblay*, 256 F.2d 615 (7th Cir. 1958); *United States ex rel. Swaggerty* v. *Knoch*, 245 F.2d 229 (7th Cir. 1957).

In the light of the foregoing observations, petitioners' motions for further discovery, for a vacation of judgment, or for a new trial are each denied. The motion of the government for summary judgment on petitioners' Section 2255 petition is granted, and petitioners' prayer for relief under Title 28, Section 2255 is denied.

The stay of execution heretofore granted to all petitioners pending the determination of these matters is vacated, and petitioner-defendants are ordered to surrender to the United States Marshal before 12 noon on July 22. The several defendants may surrender directly to the designated penal institutions if appropriate arrangements therefor are timely made.

Enter:

/s/ *Frank J. McGarr*
United States District Judge

Dated: July 11, 1975

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1659

EDWARD J. BARRY, THOMAS D. BATASTINI, NATALE R. CALÆ, JOHN CATALANO, MARTIN D. ESHOO, EDWARD P. FINN, CARL FLAGG, JOHN M. GERAGHTY, PHILIP R. GRANA, EDWARD MCGEE, HARRY R. SALVESEN, JOSEPH A. SCHILLINGER, STEVE L. SENO, WILLIAM D. SWALLOW, THOMAS D. WEST, MIKE ZAKOIAN, and CLARENCE BRAASCH,
Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74 C 3432
FRANK J. MCGARR, *Judge.*

ARGUED NOVEMBER 7, 1975 — DECIDED JANUARY 13, 1976

Before FAIRCHILD, *Chief Judge*, ADAMS, *Circuit Judge*,* and CAMPBELL, *Senior District Judge*.**

ADAMS, *Circuit Judge*. In this appeal, we are asked to decide whether the district judge who presided at the petitioners' criminal trial contravened the mandatory disqualification statute,[1] whether there was prosecutorial mis-

* The Honorable Arlin M. Adams, Circuit Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

** The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

[1] 28 U.S.C. § 455 (1970).

conduct warranting reversal in connection with the judge's decision not to recuse himself, and whether the scope of the proceedings held in the district court in this collateral attack on the convictions was improperly restricted.

I.

The prosecutions that led to the petition for habeas corpus presently before us arose out of a pervasive scheme of extortion involving the vice squad of Chicago's 18th Police District.[2] Federal jurisdiction over the crimes, which consisted of periodic payoffs from bar and tavern owners to the defendant police officers, was obtained through a then-novel interpretation of the Hobbs Act.[3]

When the case was ready for trial, it was assigned to Judge William J. Bauer.[4] Because he had served from July 1970 until November 1971 as United States Attorney for the district in which the prosecution was brought, Judge Bauer requested that office to advise him of the date when the investigation underlying the case had begun. In response, he received an affidavit from James J. Annes, a Special Agent with the FBI, stating that the investigation had formally commenced in May 1972—several months after Judge Bauer had left the office of the U.S. Attorney. As a result of this information, Judge Bauer decided not to disqualify himself from presiding at the trial. The trial and convictions followed.

After affirmance of the convictions by this Court,[5] petitions were filed under 28 U.S.C. §2255. The district court granted the government's motion for summary judgment and denied relief. We affirm.

[2] An exposition of the distressing factual background of the criminal conspiracy is presented in considerable detail in an opinion by Justice Tom Clark, sitting by designation, which affirmed the convictions. United States v. Braasch, 505 F.2d 139, 141-44 (7th Cir. 1974), *cert. denied sub nom* Barry v. United States, 421 U.S. 910 (1975).

[3] 18 U.S.C. § 1951 (1970). The contention that the shakedown racket did not affect interstate commerce, as required by the statute, was flatly rejected by this Court. United States v. Braasch, 505 F.2d 139, 147 (7th Cir. 1974), *cert. denied sub nom.* Barry v. United States, 421 U.S. 910 (1975). *See also* United States v. DeMet, 486 F.2d 816, 821-22 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

[4] Judge Bauer has subsequently been appointed to this Court.

[5] United States v. Braasch, 505 F.2d 139 (7th Cir. 1974), *cert. denied sub. nom* Barry v. United States, 421 U.S. 910 (1975).

II.

Petitioners have raised three primary arguments in this Court. The first is that under the circumstances here, the provisions of 28 U.S.C. §455[6] required Judge Bauer to disqualify himself from presiding at the criminal trial. This is so, it is asserted, for two reasons. First, the policy decision to employ the Hobbs Act to combat the police extortion ring, a use to which it had not previously been put, was allegedly made by U.S. Attorney Bauer. It is maintained that this made him "of counsel" to the United States Government and also gave him a "substantial interest" in prosecutions that rely upon that theory; disqualification was thus required. Second, U.S. Attorney Bauer allegedly appeared before and encouraged the grand jury that indicted the members of the 18th District's vice squad. It is urged that such conduct also mandated disqualification under section 455.

The next contention set forth by petitioners is that when Judge Bauer asked the office of the U.S. Attorney the date when the investigation had begun, in order to determine whether disqualification was called for, the answer was an intentional misrepresentation of the facts. The petitioners assert that the investigation had in fact commenced during the tenure of U.S. Attorney Bauer, and that he did not disqualify himself because he was improperly told it had begun after his appointment to the bench. The argument continues that the government was thus able, as a fruit of its alleged impropriety, to present its case to a judge who was already favorably disposed to its prosecutorial theory.

Finally, petitioners claim that their section 2255 action was invalidly restricted in the district court. They contend that discovery was unduly limited, and that the district court erroneously granted summary judgment to the government on the basis of conflicting affidavits. They further assert that although section 2255 requires a hearing unless "the motion and the files and records of the case con-

[6] 28 U.S.C. § 455 (1970) provides:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

clusively show the prisoner is entitled to no relief," and although this was not conclusively shown, no hearing was granted them.

Meeting the claims advanced by the petitioners, the government contends, first, that this "case" did not get under way until the tenure of William Bauer as U.S. Attorney had ended. It further submits that the policy decision to use the Hobbs Act was not made by U. S. Attorney Bauer, and that even if it were, disqualification was not required. Finally, it is maintained that ample discovery was allowed; that the affidavits did not conflict in any material way; and that no hearing was required, since the claim raised by petitioners was not a substantial one.

Our analysis of the applicability of 28 U.S.C. §455 in the circumstances present here leads to the conclusion that Judge Bauer's disqualification was not mandated by the statute.[7]

[7] The possibility that Judge Bauer's disqualification was mandated by § 455 was not raised until the § 2255 petition was filed in November 1974, more than 15 months after the trial began and 13 months after the verdicts of guilty were rendered by the jury. In similar circumstances, some courts have found a waiver of any § 455 objections. *See, e.g.*, Zovluck v. United States, 448 F.2d 339, 343 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); Adams v. United States, 302 F.2d 307, 310 (5th Cir. 1962); Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961). It was particularly common for courts to find waiver before the statute was amended in 1948. Until that year, disqualification was required only after "application by either party. . . ." Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090. *See, e.g., In re* Fox West Coast Theatres, 25 F. Supp. 250, 259 (S.D. Cal. 1936), *aff'd*, 88 F.2d 212 (9th Cir.), *cert. denied sub. nom* Talley v. Fox Film Corp., 301 U.S. 710 (1937); Borough of Hasbrouck Heights v. Agrios, 10 F. Supp. 371, 374 (D.N.J. 1935).

Although the statute is now written in mandatory terms, without the need for a motion by the parties, some courts nonetheless have allowed the statute's requirements to be waived by express consent of the parties. Thomas v. United States, 363 F.2d 849, 851 (9th Cir. 1966); Harris v. United States, 338 F.2d 75, 79 (9th Cir. 1964); Neil v. United States, 205 F.2d 121, 125 (9th Cir. 1953); Neiman-Marcus Co. v. Lait, 107 F. Supp. 96, 102 (S.D.N.Y. 1952); *cf.* Comment, Disqualification for Interest of Lower Federal Court Judges, 71 Mich. L. Rev. 538, 543 (1973).

Only one court has held that the 1948 amendment precludes a waiver of the § 455 objection. United States v. Amerine, 411 F.2d 1130, 1134 (6th Cir. 1969). *See* Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 738 n. 14 (1973). We believe that this is the more informed view, and thus reach the merits of the petitioners' § 455 claim.

Section 455 refers only to particular relationships by the judge "in any *case*. . . ."[8] This limitation is a significant one. The two courts of appeals that have construed the phrase "in any case" have given it a rather strict meaning, one which we follow. In *United States* v. *Wilson*, 426 F.2d 268, 269 (6th Cir. 1970), the Sixth Circuit interpreted it as follows:

> "A 'case' does not, of course, necessarily come into being with the happening of the offense. The critical point for *mandatory* disqualification is, we think, the initiation of the prosecution. For purposes of 28 U.S.C. §455, we believe that a 'case' begins with the first formal prosecutorial proceedings (arrest, complaint or indictment) which is designed to bring a named alleged offender before the court."

The Third Circuit has taken the same approach, holding that there is no criminal "case" when there has not yet been an "arrest or indictment. . . ." *In re* Grand Jury Investigation, 486 F.2d 1013, 1015-16 (3d Cir. 1973), *cert. denied sub nom.* Testa v. United States, 417 U.S. 919 (1974).[9]

The affidavits filed in the district court in this proceeding show that no "case" against the petitioners existed until after Mr. Bauer had left the office of the U.S. Attorney. The affidavit by James J. Annes, the FBI Special Agent, averred that the investigation had not begun until May 1972, about five months after Judge Bauer had resigned as U.S. Attorney. This affidavit was undisputed. Petitioners proffered testimony from four individuals indicating that FBI agents had, in 1970 and 1971, asked questions of several persons about payoffs to policemen by tavern owners. But mere questioning of a few individuals does

[8] When the statute was amended once again in 1974, the "case" requirement was eliminated and the standards for disqualification were modified. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609. The 1974 amendment does not affect the trial of the petitioners, however, because the trial occurred prior to the effective date of the new statute. *Id.* § 3; Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 505 (D.S.C. 1975); United States v. Clark, 398 F. Supp. 341, 362 n. 13 (E.D. Pa. 1975).

[9] *Cf.* Gravenmier v. United States, 469 F.2d 66, 67 (9th Cir. 1972). Congressman Kastenmeier, the sponsor of the 1974 amendment to § 455, views the "case" requirement of the pre-1974 version of the statute in the same way as do the Third and Sixth Circuits. 120 Cong. Rec. H 10731 (daily ed. Nov. 18, 1974).

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not meet the *Wilson* standard of attempting "to bring a *named* alleged defender before the court,"[10] nor does it constitute the formal opening of the prosecution required by both *Wilson*[11] and *Grand Jury*.[12] No other evidence was presented to the district court that even tended to show that the prosecution either began or continued during the tenure of U.S. Attorney Bauer.[13]

Thus, Judge Bauer did not sit in a "case" in which he had been "of counsel"[14] or in which he had a "substantial interest,"[15] the congressional standards for mandatory

[10] 426 F.2d at 269 (emphasis added).

[11] *Id.*

[12] 486 F.2d at 1015.

[13] Petitioners note that Thomas Foran, the previous U. S. Attorney, refused to represent some of them in their defense to this prosecution, on the basis that when he was the U. S. Attorney he had seen a document regarding payoffs to one of the petitioners. They contend that this shows that the investigation began during the Foran term in office and continued while Mr. Bauer occupied the office. However, Mr. Foran had seen the document in connection with a totally unrelated concern, and no office file relating to the payoff scheme was opened when he was U. S. Attorney. We thus reject the argument that the "case" began before, and continued during, U. S. Attorney Bauer's term.

This interpretation of the documents presented to the district court also resolves the petitioners' claim that it was improper for the district court to grant summary judgment. In our view of the case, there was no dispute over any *material* factual issue, the standard established in Rule 56(c) of the Federal Rules of Civil Procedure. Kiess v. Eason, 442 F.2d 712, 713 (7th Cir. 1971).

[14] There is no doubt that the U. S. Attorney is "of counsel" to the United States in all criminal prosecutions brought within his district. This has been the rule for almost 30 years, since the decisions in United States v. Vasilick, 160 F.2d 631, 632 (3d Cir. 1947), and United States v. Maher, 88 F. Supp. 1007, 1008 (D. Me. 1950). Courts uniformly follow that rule today. *See, e.g., In re* Grand Jury Investigation, 486 F.2d 1013, 1015 (3d Cir. 1973), *cert. denied sub. nom* Testa v. United States, 417 U.S. 919 (1974); United States v. Amerine, 411 F.2d 1130, 1133 (6th Cir. 1969); Adams v. United States, 302 F.2d 307, 310 (5th Cir. 1962).

[15] The "substantial interest" contemplated by § 455 is usually construed as a financial interest. *See, e.g., In re* Grand Jury Investigation, 486 F.2d 1013, 1016 (3d Cir. 1973), *cert. denied sub. nom* Testa v. United States, 417 U.S. 919 (1974); United States v. Bell, 351 F.2d 868, 878 (6th Cir. 1965), *cert. denied*, 383 U.S. 947 (1966); Kinnear-Weed Corp. v. Humble Oil & Refining Co., 324 F. Supp. 1371, 1385 (S.D. Tex. 1969), *aff'd*, 441 F.2d 631(5th Cir.), *cert. denied*, 404 U.S. 941 (1971); Note, *supra* note 7, at 740; Comment, *supra* note 7, at 553.

The Fifth Circuit has taken the broader view that a "substantial interest" is not only financial, but encompasses "the interest that any lawyer has in pushing his case to a successful conclusion." Adams v. United States, 302 F.2d 307, 310 (5th Cir. 1962); *accord*, Roberson v. United States, 249 F.2d 737, 741 (5th Cir. 1957), *cert. denied*, 356 U.S. 919 (1958).

Because we conclude that there was no relationship to a § 455 "case," we need not address this conflict.

disqualification. There was therefore no violation of the statute.[16]

Nor did Judge Bauer's decision to preside at the trial lead to a constitutional violation. The Supreme Court has held that the due process clause prohibits a criminal trial in which the judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case.[17] But it is not alleged that Judge Bauer had any financial stake in the outcome of the prosecutions here. More broadly, the Supreme Court has ruled that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."[18] The conflicts of interest present in the cases in which this standard was enunciated were, however, much more extreme than the lack of impartiality suggested here.[19]

Furthermore, any error was harmless.[20] At the end of the trial, the defendants stated to Judge Bauer that he had been impeccably fair and just in presiding over the proceedings. The Judge's ruling of law that the Hobbs Act applied to the activities of the police in this case cannot even be considered error, since the same conclusion was reached independently by this Court on appeal.[21]

[16] *Cf.* United States v. Ming, 466 F.2d 1000, 1004 (7th Cir.), *cert. denied*, 409 U.S. 915 (1972) (duty to sit). No evidence whatever was proffered in support of the allegation that U. S. Attorney Bauer appeared before the grand jury that investigated the extortion ring and indicted the petitioners.

[17] Tumey v. Ohio, 273 U.S. 510, 523 (1927). *Accord*, Ward v. Village of Monroeville, 409 U.S. 57, 60 (1072).

[18] Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972); *In re* Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 532 (1927).

[19] *Ward* involved a trial for traffic offenses held before a village mayor who had responsibilities for revenue production and law enforcement. The judge in *Murchison* had served as a "one-man grand jury" that indicted the defendant. And the judge in *Tumey* was a village mayor who could raise money for the village's treasury and recover his own costs only when he found defendants guilty.

[20] *See* Chapman v. California, 386 U.S. 18 (1967).

[21] *See* United States v. Braasch, 505 F.2d 139, 147 (7th Cir. 1974), *cert. denied sub. nom* Barry v. United States, 421 U.S. 910 (1975). We also observe that the considerations present in a collateral attack on a conviction, such as that here, may differ from those in a direct appeal. *Cf.* Schneckloth v. Bustamonte, 412 U.S. 250-75 (1973) (Powell, J., concurring).

Finally, several Supreme Court Justices have sat in cases in which their relationship to the issues involved was at least as close as was Judge Bauer's in this case. The most recent example is Justice Rehnquist, who declined to disqualify himself from sitting in *Laird* v. *Tatum*[22] even though he had appeared as the Justice Department's expert witness before a Congressional subcommittee to give testimony about some of the issues raised in *Laird*.[23] In his memorandum opinion on the disqualification issue, Justice Rehnquist mentioned other examples of Justices who had sat in cases despite an apparent conflict greater than Judges Bauer's was here:[24] as a Senator, Hugo Black was a primary author of the Fair Labor Standards Act; yet as a Justice he sat in the case upholding its constitutionality and in later cases construing it. As a law professor, Felix Frankfurter was a co-author of *The Labor Injunction* and a principal drafter of the Norris-LaGuardia Act; yet as a Justice he delivered the opinion of the Court in the *Hutcheson* case, which determined the scope of that statute. There are other examples as well.[25]

Accordingly, we hold that Judge Bauer violated neither section 455 nor contemporary constitutional standards by presiding at the trial in this case.[26]

IV.

It is alleged that when Judge Bauer asked the U. S. Attorney's office when the investigation of the petitioners had begun, he was intentionally misled into believing that it had commenced after his departure from that office. In fact, petitioners state, it began before U. S. Attorney Bauer took the bench. They proceed to argue that the intentional misrepresentation was a prosecutorial impropriety that requires reversal. We reject that argument.

[22] 408 U.S. 1 (1972).

[23] 409 U.S. 824, 824-28 (1972) (memorandum of Rehnquist, J.).

[24] *Id.* at 831-32.

[25] *See id.* at 832-33. For another variant of the problem, see Pennsylvania v. Operating Eng'rs Local 542, 388 F. Supp. 155 (E.D. Pa. 1974) (Higginbotham, J.).

[26] For a discussion of the delicate question whether a judge should sit or disqualify himself, *see* Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 746-47 (1973).

First, this claim was neither set forth in the section 455 petition nor discussed in the two memorandum opinions by the district court. Such an issue may not be raised for the first time in this Court.[27]

Second, we have already determined that it was not constitutional error for Judge Bauer to preside at the trial of this case. Thus, assuming *arguendo* that the communication was erroneous, it would not be unconstitutional under the facts in this case for him to have relied upon it in deciding whether to sit.

V.

Petitioners' final argument in this appeal is that the procedures used by the district court in determining the section 2255 motion were deficient in two respects: the scope of discovery allowed by the court was impermissibly narrow, and the denial of an evidentiary hearing violated the precepts of section 2255. We reject both arguments.

The Supreme Court's decision in Harris v. Nelson, 394 U.S. 286 (1969), makes clear that the scope of discovery to be allowed in a collateral attack upon a conviction lies in the discretion of the district court. Rejecting the contention that the Federal Rules of Civil Procedure should apply directly to habeas corpus proceedings, the Supreme Court held that certain federal procedural rules could be applied "by analogy or otherwise, where appropriate."[28] Through the power granted by the All Writs Act, district courts may order such discovery, in this fashion, as they deem necessary to determine the facts adequately.[29]

In the proceedings held in the district court, depositions and affidavits were considered. Although it is understandable that petitioners may have desired a chance for

[27] Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co., 508 F.2d 417, 420 (7th Cir. 1975). In Ohio Casualty Ins. Co. v. Rynearson, 507 F.2d 573, 582 (7th Cir. 1974), this Court stated that "[t]he principle that new issues . . . may not be raised for the first time on appeal is too well known to require citation."

[28] 394 U.S. at 294 (footnote omitted)

[29] *Id.* at 300. *Harris* arose in the context of a state habeas corpus petition, but its principles have been applied directly to federal proceedings governed by § 2255, as well. Argo v. United States, 473 F.2d 1315, 1317 (9th Cir.), *cert. denied*, 412 U.S. 906 (1973).

greater discovery than that, we certainly cannot say that the scope of discovery allowed by the district court constituted an abuse of its discretion.

The assertion that the district court should have held a hearing is based upon the language of section 2255[30] and the construction given it in Machibroda v. United States, 368 U.S. 487 (1962). However, it is the rule of this Court that, in order for a hearing to be granted, the petition must be accompanied by a detailed and specific affidavit[31] which shows that the petitioner has actual proof of the allegations going beyond mere unsupported assertions.[32] The petitioners failed to meet this burden. Thomas Foran's affidavit, the only one filed with the petition, was not specifically detailed, nor did it demonstrate that petitioners had actual proof of the allegations they had made. The affidavit stated only that Mr. Foran had refused to represent several of the petitioners in their criminal defense at the original trial because he "recalled that facts relevant to [the case] had been called to [his] attention while [he] was United States Attorney . . . ." This by itself was not sufficient to require a hearing, and its alleged relevance to the case was weakened by Mr. Foran's deposition, when he stated that the "facts" he had learned had been brought to his attention in a totally unrelated context. Thus, the petition that was employed to support the claim that petitioners were entitled to a hearing was essentially

[30] The statute provides in part that "[u]nless the motion and the files and records of the case conclusievly show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon. . . ."

[31] Moody v. United States, 497 F.2d 359, 362 (7th Cir. 1974); Burris v. United States, 430 F.2d 399, 401 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); Stetson v. United States, 417 F.2d 1250, 1252-53 (7th Cir. 1969); United States v. Martinez, 413 F.2d 61, 64 (7th Cir. 1969).

[32] United States v. Lowe, 367 F.2d 44, 45-46 (7th Cir. 1966); Mitchell v. United States, 359 F.2d 833, 837 (7th Cir. 1966); Davis v. United States, 311 F.2d 495, 496 (7th Cir.), *cert. denied* 374 U.S. 846 (1963); *United States v. Mathison*, 256 F.2d 803, 805 (7th Cir.), *cert. denied*, 358 U.S. 857 (1958); United States v. Trumblay, 256 F.2d 615, 617 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959).

VI.

predicated on conjecture and speculation.[33] This is patently insufficient.

Accordingly, the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

[33] For an example of factual support of a petition clearly calling for a hearing, see Teague v. United States, 499 F.2d 1381 (7th Cir. 1974).

A hearing was ordered in Sanders v. United States, 373 U.S. 1, 19-20 (1963), on the basis of allegations alone. However, the hearing there required testimony only from the petitioner himself. Where a high governmental official would have to be extensively interrogated, different considerations are appropriate, and the requirement of factual support for the allegations, established in this Court's prior decisions, will be read strictly.

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28 U.S.C. §455 (1970):

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. §2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 C.F.R. §16.22:

No employee of former employee of the Department of Justice shall, in response to a demand of a court or other authority, produce any material contained in the files of the Department or disclose any information relating to material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the appropriate Department official or the Attorney General in accordance with §16.24.

Rule 7 of the Rules Governing Section 2255 Proceedings for the United States District Courts (effective August 1, 1976):

Expansion of record

(a) Direction for expansion. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The court may require the authentication of any material under subdivision (b) or (c).

Supreme Court, U. S.
FILED
JUL 22 1976
MICHAEL RODAK, JR., CLERK

No. 75-1702

In the Supreme Court of the United States

OCTOBER TERM, 1976

EDWARD J. BARRY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A17-A27) is reported at 528 F. 2d 1094. The opinions of the district court (Pet. App. A1-A16) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1976. A petition for rehearing was denied on February 24, 1976. The petition for a writ of certiorari was filed on May 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a district judge may preside over a trial that will be controlled by legal principles on which the judge may have taken a position while serving as United States Attorney.

2. Whether the prosecution misrepresented to the district judge facts relevant to his recusal decision.

3. Whether the district court abused its discretion in limiting discovery.

4. Whether, on the facts of this case, there should have been an evidentiary hearing on petitioners' motion for relief under 28 U.S.C. 2255.

STATUTORY PROVISION INVOLVED

28 U.S.C. 455 provides:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to commit extortion, in violation of 18 U.S.C. 1951. Petitioners Batastini, Eshoo, Flagg, Geraghty, Grana, Schillinger, Swallow, West, and Braasch also were convicted of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. Petitioners were sentenced to varying terms of imprisonment. The court of appeals affirmed. *United States* v. *Braasch*, 505 F. 2d 139, certiorari denied *sub nom. Barry* v. *United States*, 421 U.S. 910.

On November 26, 1974, thirteen months after the verdicts of guilty, petitioners filed a motion in the district court seeking collateral relief pursuant to 28 U.S.C. 2255. For the first time, they claimed that District Judge William

J. Bauer, who had presided at their trial, should have recused himself.

Petitioners asserted that the investigation leading to their prosecution began during Judge Bauer's term as United States Attorney for the Northern District of Illinois, and that he knew about the investigation. Petitioners also maintained that Judge Bauer made the policy decision to prosecute police extortion under the Hobbs Act (18 U.S.C. 1951), thereby acquiring a "substantial interest" in prosecutions based upon that theory. These assertions were founded upon an affidavit of Thomas A. Foran, Judge Bauer's predecessor as United States Attorney. The affidavit stated in essence that Foran believed that, while United States Attorney, he had received information concerning one or more of the petitioners (Pet. App. A6).

After petitioners' trial, Judge Bauer was appointed to the court of appeals. The collateral proceedings were assigned to Judge McGarr, and discovery began with the deposition of Foran.[1] Foran stated that in 1970 he had received an informational memorandum from the Federal Bureau of Investigation in connection with a matter unrelated to the instant case. The memorandum mentioned petitioner Braasch and police payoffs; Foran characterized the information as "almost in the rumor stage," and concluded that it did not represent the results of an investigation. Foran stated that he never discussed the matter with United States Attorney Bauer.

Based upon this deposition and an affidavit of Special Agent James J. Annes, who swore that the investigation began in May 1972, the district court concluded (Pet.

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[1]The deposition is summarized (Pet. App. A6-A8) in the second opinion of the district court.

App. A8) that the investigation leading to petitioners' indictment began after Judge Bauer left the office of United States Attorney in November 1971.[2] Despite his belief that "the proof of the allegations of petitioners [was] so negligible as to consist virtually of unsupported assertions," Judge McGarr continued the case to allow Judge Bauer to respond by affidavit (Pet. App. A11).

Judge Bauer's affidavit denied any discussions, decisions or knowledge of facts related to this case. Petitioners then filed additional affidavits stating that prior to May 1972 agents may have questioned tavern owners in petitioners' district concerning police extortion. Judge McGarr concluded (Pet. App. A14) that these supplementary affidavits were not inconsistent with the Annes affidavit. He also rejected petitioners' argument that Judge Bauer's alleged participation in legal discussions leading to the novel interpretation of the Hobbs Act required his recusal, reasoning that "[a] general policy decision to interpret or apply a statute in a given way, is not a case nor a decision made within the context of a case" (Pet. App. A15). Judge McGarr therefore granted the government's motion for summary judgment (Pet. App. A16). The court of appeals affirmed in a comprehensive opinion.

ARGUMENT

1. Petitioners contend that Judge Bauer "actively participated" (Pet. 27) in the preparation of their case as United States Attorney before his appointment to the bench, and therefore that 28 U.S.C. 455 required him

[2]An affidavit of petitioner Seno also was considered by Judge McGarr, which found it to be "a sworn statement by a felon with an interest in the outcome of a case, reciting hearsay information from an unidentified source" and lending no support to petitioners' claims (Pet. App. A10).

to recuse himself.[3] See *Laird* v. *Tatum*, 409 U.S. 824, 828 (Rehnquist, J., in chambers).

Section 455 applies only to "any case" to which a judge has had a specified relationship.[4] Recognizing the significance of the limitation, the court of appeals properly followed *United States* v. *Wilson*, 426 F. 2d 268, 269 (C.A. 6) (see Pet. App. A21):[5]

> A "case" does not, of course, necessarily come into being with the happening of the offense. The critical point for *mandatory* disqualification is, we think, the initiation of the prosecution. For purposes of 28 U.S.C. §455, we believe that a "case" begins with the first formal prosecutorial proceedings (arrest, complaint or indictment) which is designed to bring a named alleged offender before the court.

See also *In re Grand Jury Investigation*, 486 F. 2d 1013, 1015-1016 (C.A. 3), certiorari denied *sub nom. Testa* v.

[3]Petitioners did not ask Judge Bauer at trial to disqualify himself. They raised the issue for the first time in their Section 2255 petition. The court of appeals considered this factor and, agreeing with *United States* v. *Amerine*, 411 F. 2d 1130, 1134 (C.A. 6), held that the mandatory provisions of 28 U.S.C. 455 preclude any waiver of objections (Pet. App. A20 n. 7). We disagree. *Zovluck* v. *United States*, 448 F. 2d 339, 343 (C.A. 2), certiorari denied, 405 U.S. 1043; *Adams* v. *United States*, 302 F. 2d 307, 310 (C.A. 5); *Ramirez* v. *United States*, 294 F. 2d 277, 283 (C.A. 9). Because the court of appeals reached the merits of petitioners' arguments, however, there is no occasion to resolve this conflict.

[4]This language was eliminated when the statute was amended in 1974. The amendment is inapplicable here because the trial preceded the effective date of the statute. Pub. L. No. 93-512, 88 Stat. 1609. Because of this amendment the problems presented by this case have little continuing importance.

[5]Petitioners' argument (Pet. 27) that the instant case conflicts with *Wilson* is groundless. The court of appeals explicitly followed *Wilson*. See Pet. App. A21, A22.

United States 417 U.S. 919 (there is no "case" until there has been an arrest or indictment).

The court of appeals correctly held (Pet. App. A21-A22) that the affidavits and deposition showed without contradiction that no "case" existed during the term of United States Attorney Bauer. No arrests were made and no indictment was returned until after he left office.

Petitioners contend, however, that United States Attorney Bauer made the original policy decision to prosecute police extortion under the Hobbs Act, thereby "actively participated in the preparation of the case brought against petitioners" (Pet. 27) and requiring his disqualification. As there was no "case" in which to participate during Judge Bauer's tenure of office as United States Attorney, however, this argument is incorrect. Furthermore, notwithstanding the right of every litigant to a fair trial administered by an impartial judge, "neither the oath [of the federal judiciary], the disqualification statute, nor the practice of former Justices of this Court guarantees a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law." *Laird* v. *Tatum*, *supra*, 409 U.S. at 838-839.

Finally, as the court of appeals correctly held (Pet. App. A23), any error was harmless. At the conclusion of their trial, petitioners commended Judge Bauer for his fairness. And, as the court of appeals held on direct appeal from petitioners' conviction, Judge Bauer's interpretation of the Hobbs Act is correct. Petitioners were not aggrieved in any cognizable sense by the loss of an opportunity to benefit from the erroneous ruling some other judge might have made.

2. Asserting that the prosecution manipulated the reassignment of their case to Judge Bauer and then, to

retain the advantage of his "known favorable predisposition to the prosecution" (Pet. 34), misrepresented to him the commencement date of the investigation, petitioners contend (Pet, 33-35) that such actions amounted to prosecutorial misconduct requiring relief under 28 U.S.C. 2255. There is no supporting proof for these charges, however.[6] Both the district court (Pet. App. A8) and the court of appeals (Pet. App. A21) determined that the undisputed affidavit of Agent Annes established that the investigation began in May 1972, several months after Judge Bauer resigned as United States Attorney. The evidence offered by petitioners indicated only that the FBI may have made inquiries as early as 1970. As the court below aptly stated (Pet. App. A21-A22):

> [M]ere questioning of a few individuals does not meet the *Wilson* standard of attempting "to bring a named alleged defender [*sic*] before the court," nor does it constitute the formal opening of the prosecution required by both *Wilson* and [*In re Grand Jury Investigation, supra*]. No other evidence was presented to the district court that even tended to show that the prosecution either began or continued during the tenure of U.S. Attorney Bauer.

3. Petitioners contend (Pet. 14-26) that the denial of broader discovery and an evidentiary hearing violated 28 U.S.C. 2255. That section, however, requires no hearing when the record "conclusively shows" that the petitioner is entitled to no relief. *Fontaine* v. *United States*, 411 U.S. 213, 215; *Sanders* v. *United States*, 373 U.S. 1, 6; *Machibroda* v. *United States*, 368

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[6]The case was transferred pursuant to a procedure approved on direct appeal by the court of appeals. 505 F. 2d at 147.

U.S. 487, 494. The record may be expanded by the filing of affidavits, letters and other documentary evidence, and the district court may properly rely on the expanded record in denying a Section 2255 petition without a hearing. *Raines* v. *United States*, 423 F. 2d 526, 529-530 (C.A. 4); *United States* v. *Carlino*, 400 F. 2d 56, 58 (C.A. 2), certiorari denied, 394 U.S. 1013; *Mirra* v. *United States*, 379 F. 2d 782, 787 (C.A. 2), certiorari denied, 389 U.S. 1022. Furthermore, the scope of discovery permitted in collateral proceedings is within the discretion of the district court. *Harris* v. *Nelson*, 394 U.S. 286, 290.

The court of appeals examined the discovery procedures authorized by the district court in this case and properly concluded (Pet. App. A26) that the court did not abuse its discretion. On the basis of the expanded record, the courts below found petitioners' claims to be "a series of unsupportable allegations" (Pet. App. A16), "predicated on conjecture and speculation" (Pet. App. A27). The deposition of Thomas Foran showed that no investigation began while he was in office and, together with Judge Bauer's affidavit, established that no information regarding petitioners had been given to United States Attorney Bauer. The affidavit of Agent Annes, giving the starting date of the investigation as May 1972, was not contradicted by affidavits filed by petitioners, which showed only that several individuals had been questioned earlier (Pet. App. A14). There was no need to determine the credibility of conflicting affiants, and petitioners' argument that the expansion of the record procedures and denial of a hearing violated Section 2255 is unavailing.

The new rules governing Section 2255 proceedings (Pet. App. A29) become effective August 1, 1976, and are therefore inapplicable here. No court has interpreted the new rules for Section 2255 cases, and there is no need for this Court to do so in the absence of a conflict among the circuits.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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